Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

Civil Action No.———— 76-1365

SILAS W. REDMOND, PLAINTIFF-APPELLANT

VS. JURISDICTIONAL STATEMENT

ROBERT WHEELER, C. P. SULLIVAN, HOWARD DOWDY, JAMES ALEXANDER, JR., E. A. ROSS, AND E. W. ANDERSON, JR., BOARD OF TRUSTEES OF THE POLICEMEN'S AND FIREMEN'S PENSION FUND FOR THE CITY OF MAYFIELD, KENTUCKY, DEFENDANTS-APPELLEES

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

ATTORNEY FOR PLAINTIFF-APPELLANT

LOUIS V. MANGRUM
Attorney at Law
Mangrum Building
Mayfield, Kentucky 42066
Tel. 502-247-6702

4/1/77

This is to certify that three of the Jurisdictional Statement have been served on the defendants-appellees by mailing same to their counsel, Hon. Sam Boyd Neely, 238 North 7th Street, Mayfield, Kentucky 42066, with postage prepaid pursuant to Rule 33 of this Court.

Louis V. Mangrum

Louis V. Mangrum, counsel for the Plaintiff-Appellant

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POLICEMEN'S AND FIREMEN'S
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OPINIONS OF THE COURTS BELOW

The plaintiff-appellant, Silas W. Redmond, will refer to the opinions of the Courts below in their chronological order all of which are set out verbatim in the appendix.

This case arose over the plaintiff-appellant's right to a pension due to disability pursuant to KRS 95.520 through KRS 95.620 which became effective June 16, 1966 making it mandatory for the City of Mayfield, Kentucky to establish a pension fund and providing for the procedure by which it was to be administered. KRS 95.540 vested the defendants-appellees with the duty to conduct a hearing in regard to same and provided that their action in regard to same was conclusive. The defendants-appellees did in this case conduct the hearing and denied the plaintiff-appellant pension benefits. All the issues raised herein concern the nature of the hearing held and the action of the defendants-appellees in the light of 'due process of law' guaranteed the plaintiff-appellant under the Constitution of the United States Of America, Amendment number 14 and the Constitution of The Commonwealth Of Kentucky Articles numbered 2 and 14. The decisions of the Courts below for one reason or another have held that KRS 95.540 as applied in this case both in regard to the nature of the hearing conducted by the defendants-appellees and their findings on the merits at same is not unconstitutional in the light of 'due process of law' nor was the plaintiff-appellant denied 'due process of law' by the arbitrary action of the defendants-appellees separate and apart from said statute.

The Graves Circuit Court Of The Commonwealth of Kentucky entered its Findings Of Fact And Conclusions Of Law along with its Judgment on April 27, 1976.

In answer to the plaintiff-appellant's allegations in his Complaint And Petition Of Appeal that KRS 95.540 was unconstitutional in making the action of the Board Of Trustees Of The Pension Fund conclusive and not subject to judicial review on the merits or as to the nature of the

hearing as to due process of law because KRS 95.520 required the City of Mayfield to establish a pension fund which became a part of the plaintiff-appellant's contract of employment and a vested property right, the Graves Circuit Court of the Commonwealth Of Kentucky in substance found that since the plaintiff-appellant had not made any contributions to the pension fund and in light of KRS 95.540 (1) that there was not any reason to disturb the findings and actions of the defendants-appellees in denying him a pension and entered Judgment accordingly.

The plaintiff-appellant in appealing to the Supreme Court of Kentucky prior to the Court Of Appeals Of Kentucky being composed which later docketed the case for decision by the Court Of Appeals of Kentucky raised the issues before the Court of Appeals Of Kentucky by stating the following three questions in his brief.

1. DID THE GRAVES CIRCUIT COURT COMMIT PREJUDICIAL ERROR AGAINST THE APPELLANT, SILAS W. REDMOND, BY AFFIRMING THE ACTION OF THE APPELLEES WHERE ONE OF THE APPELLEES, E. W. ANDERSON, JR., WHEN FUNCTIONING AS A MEMBER OF THE BOARD OF TRUSTEES OF THE POLICEMEN'S AND FIREMEN'S PENSION FUND FOR THE CITY OF MAYFIELD, KENTUCKY, AS THE FINDER OF FACTS, PROCLAIMED THAT HE WOULD NOT LISTEN TO COUNSEL FOR THE APPELLANT AND DENIED THE APPELLANT A FAIR HEARING IN VIOLATION OF DUE PROCESS OF LAW?

2. DID THE GRAVES CIRCUIT COURT COMMIT PREJUDICIAL ERROR AGAINST THE APPELLANT, SILAS W. REDMOND, BY AFFIRMING THE ACTION OF THE APPELLEES IN DENYING THE APPELLANT A PENSION WHEN ALL THE EVIDENCE IS TO THE EFFECT THAT THE INJURIES RECEIVED BY THE APPELLANT IN THE COURSE OF HIS EMPLOYMENT AS A POLICEMAN CONTRIBUTED TO BRING ABOUT HIS TOTAL DISABILITY WHERE THE APPELLEES SPECIFICALLY FOUND THAT THE APPELLANT'S DISABILITY WAS NOT DUE TO HIS SERVICE IN THE DEPARTMENT BUT WAS TRIGGERED BY INJURIES RECEIVED BY HIM PRIOR TO

HIS SERVICE IN THE POLICE DEPARTMENT WHICH OVER A PERIOD OF YEARS HAS CAUSED HIS BACK AND SPINE TO DEGENERATE THROUGH NATURAL PROCESSES, BECAUSE SUCH FINDING OF FACT BY THE APPELLEES IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD OF THIS CASE?

3. DID THE GRAVES CIRCUIT COURT COMMIT PREJUDICIAL ERROR AGAINST THE APPELLANT, SILAS W. REDMOND, BY RELYING ON KRS 95.540 (1) BECAUSE SAID STATUTE AS APPLIED UNDER THE FACTS IN THIS CASE IS UNCONSTITUTIONAL?

The Court of Appeals of The Commonwealth of Kentucky in its decision rendered on January 7, 1977, in substance ignored the issues presented in the questions stated above and turned to the doctrine of equitable estoppel in affirming the Graves Circuit Court and stated:

"Yet, while employed as a policeman, Redmond never made any claim that the City of Mayfield should establish a pension fund. Even if Redmond is not bound by the judgment in the earlier class action which refused to make the establishment of the pension fund retroactive, neither justice nor practicality require that Redmond be entitled to share in a pension fund which was not established until long after he ceased to be an active policeman and to which he never contributed. The Court concludes that the Circuit Court did not err in dismissing Redmond's complaint."

The plaintiff-appellant filed a Motion For Discretionary Review in the Supreme Court of The Commonwealth of Kentucky wherein the same issues presented to the Court Of Appeals Of The Commonwealth Of Kentucky were presented to it and on February 15, 1977, the Supreme Court entered an Order Denying Discretionary Review.

The Court Of Appeals Of The Commonwealth Of Kentucky subsequent to the Supreme Court denying discretionary review on February 24, 1977, issued its Mandate.

STATEMENT OF GROUNDS AS TO JURISDICTION

This case involves KRS 95.540, a statute of the Commonwealth Of Kentucky, which reads as follows:

(1) The Board of trustees of the pension fund in cities of the third class may make all necessary rules for its government in the discharge of its duties, and shall hear and decide all applications for benefits or pensions. Its decision on these applications shall be conclusive, and not subject to revision or reversal, except by the board. A record shall be kept of the meetings and proceedings of the board.

On December 8, 1967, the plaintiff-appellant became totally disabled and was awarded total disability by the Workmen's Compensation Board for injuries received in the course of his employment for the City of Mayfield, Kentucky as a policeman. KRS 95.550 provides for disability benefits for policemen who become totally disabled due to an injury received in the course of their employment.

The Judgment sought to be reviewed was rendered on January 7, 1977, and by Order of the Court Of Appeals Of The Commonwealth Of Kentucky was to become effective on January 11, 1977. A Motion For Discretionary Review was filed in the Supreme Court of The Commonwealth Of Kentucky and denied by order of that Court on February 15, 1977. The Court Of Appeals Of Kentucky issued its Mandate on February 24, 1977, and Notice Of Appeal was filed in the Court Of Appeals Of The Commonwealth Of Kentucky on the 1st day of March 1977. A copy of which is set out in the Appendix verbatim.

28 U. S. C 1257 confers jurisdiction on this Court and is as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of its validity.

(3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

This Court in the case of United Air Lines, Inc. V. Makin, 410 U. S. 623, 35 L. Ed. 2d 545, 93 S. Ct. 1186, 1973, held that either the burn off rule or the storage rule as related to the consumption of fuel taxed by a state was constitutional and where two members of the Supreme Court of Illinois felt that the burn off rule was not constitutional and the Supreme Court Of Illinois upheld the state statute on the storage rule this Court remanded the case to the Supreme Court of Illinois stating:

"Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping prior to its use solely outside of Illinois. Such storage, under the plain words of the statute, does not qualify under the temporary storage exemption and, as the authorities already discussed reveal, either the storage itself or the withdrawal therefrom are uses which may be taxed without offending the commerce clause of the Federal Constitution . . . . The possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question. Beecher V. Alabama, 389 U. S. 35, 37 n. 3, 88 S. Ct. 189, 190, 19 L. Ed. 2d 35, 1967; see C. Wright, Federal Courts Article 107, P. 488 (2d ed. 1970)."

This Court in the case of Cohen V. California, 403 U. S. 15, 91 S. Ct. 1780, 1971, stated:

"The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen consistently claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal. 28 U. S. C. Article 1257 (2) Darknke-Walker Mining Co. V. Bondurant, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239, (1921)."

This Court as shown by the case of Commonwealth Of Pa., V. Board of Directions Of City Trusts of City Of Philadelphia, 77 S. Ct. 806, 353 U. S. 230, 1 L. Ed. 2d 792, will treat any federal questions raised herein in regard to due process of law not pertaining to the state statute on which this appeal is based as if raised by Petition For Writ Of Certiorari.

To the same effect is the case of Zucht V. King, 260 U. S. 174, 43 S. Ct. 24, 1922.

The state statute involved is KRS 95.540 and it can be found in Volume 2 of Baldwin's Revised Statutes and is as follows:

(1) The board of trustees of the pension fund in cities of the third class may make all necessary rules for its government in the discharge of its duties, and shall hear and decide all applications for benefits or pensions. Its decision on these applications shall be conclusive, and not subject to revision or reversal, except by the board. A record shall be kept of the meetings and proceedings of the board.

This Court in the case of Hortonville Joint School District No. 1 V. Hortonville Education Association, 96 S. Ct.

2308, 1976, held that due process of law did not require judicial review from a decision of the board in firing teachers who were unlawfully on strike but did require that its members be "capable of judging a particular controversy fairly on the basis of its own circumstances."

STATEMENT OF QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS OF KENTUCKY COMMIT PREJUDICIAL ERROR AGAINST THE PLAINTIFF-APPELLANT, SILAS W. REDMOND, BY AFFIRMING THE JUDGMENT OF THE GRAVES CIRCUIT COURT WHICH AFFIRMED THE ACTION OF THE DEFENDANTS-APPELLEES WHERE ONE OF THE DEFENDANTS-APPELLEES, E. W. ANDERSON, JR., WHEN FUNCTIONING AS A MEMBER OF THE BOARD OF TRUSTEES OF THE POLICEMEN'S AND FIREMEN'S PENSION FUND FOR THE CITY OF MAYFIELD, KENTUCKY, AS THE FINDER OF FACTS, PROCLAIMED THAT HE WOULD NOT LISTEN TO COUNSEL FOR THE PLAINTIFF-APPELLANT AND DENIED THE PLAINTIFF-APPELLANT A FAIR HEARING IN VIOLATION OF DUE PROCESS OF LAW?

2. DID THE COURT OF APPEALS OF KENTUCKY COMMIT PREJUDICIAL ERROR AGAINST THE PLAINTIFF-APPELLANT, SILAS W. REDMOND, BY AFFIRMING THE JUDGMENT OF THE GRAVES CIRCUIT COURT DENYING THE PLAINTIFF-APPELLANT A PENSION WHEN ALL THE EVIDENCE IS TO THE EFFECT THAT THE INJURIES HE RECEIVED IN THE COURSE OF HIS EMPLOYMENT AS A POLICEMAN CONTRIBUTED TO BRING ABOUT HIS TOTAL DISABILITY WHERE THE DEFENDANTS-APPELLEES SPECIFICALLY FOUND THAT THE PLAINTIFF-APPELLANT'S DISABILITY WAS NOT DUE TO HIS SERVICE IN THE DEPARTMENT BUT WAS TRIGGERED BY INJURIES RECEIVED BY HIM PRIOR TO HIS SERVICE IN THE POLICE DEPARTMENT WHICH OVER A PERIOD OF YEARS HAS CAUSED HIS BACK AND SPINE TO DEGENERATE THROUGH NATURAL PROCESSES, BECAUSE SUCH FINDING OF FACT BY THE DEFENDANTS-APPELLEES IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD OF THIS CASE?

3. DID THE COURT OF APPEALS OF KENTUCKY COMMIT PREJUDICIAL ERROR AGAINST THE PLAINTIFF-APPELLANT, SILAS W. REDMOND, BY AFFIRMING THE JUDGMENT OF THE GRAVES CIRCUIT COURT WHICH RELIED ON KRS 95.540 (1) BECAUSE SAID STATUTE AS APPLIED UNDER THE FACTS IN THIS CASE IS UNCONSTITUTIONAL?

STATEMENT OF THE CASE

The plaintiff-appellant, Silas W. Redmond, began working as a policeman for the City of Mayfield, Kentucky on October 1, 1952; (Tr. Rec. P. 20, Ls. 15-21) he injured his left foot in an alley in the course of his employment on May 30, 1960; (Tr. Rec. PP. 20 & 21, Ls. 22-25, 1 & 2) according to the plaintiff-appellant's testimony that injury alone is sufficient to prevent him from performing his duties as a policeman; (Tr. Rec. P. 21, Ls. 7-17) in April of 1966, the plaintiff-appellant in the course of his employment as a policeman was attacked by some colored people and injured his back; (Tr. Rec. P. 24, Ls. 4-17) due to the back injury the plaintiff-appellant was put in traction at different intervals for approximately six to eight weeks; (Tr. Rec. P. 24, Ls. 18-23) Dr. Hunt had the plaintiff-appellant fitted with a Snell Back Brace for the back injury; (Tr. Rec. P. 25, Ls. 19-23) the plaintiff-appellant wore that back brace constantly until January 2, 1967; (Tr. Rec. PP. 25 & 26, Ls. 24 & 25, 1-4) On January 2, 1967, the plaintiff-appellant and another policeman were picking up a drunk man at which time the plaintiff-appellant felt a sharp pain just about where the back brace came across his stomach; (Tr. Rec. PP. 26 & 27, Ls. 13-25, 1-13) subsequent to that time the plaintiff-appellant has been unable to wear the brace; (Tr. Rec. P. 26, Ls. 5-7) Dr. Montgomery operated on the plaintiff-appellant on the 30th or 31st day of August, 1967, for that injury; (Tr. Rec. P. 29, Ls. 12-15) Dr. Montgomery testified that he performed surgery on the plaintiff-appellant on August 30, 1967, and repaired a right femoral hernia; (Dep. Dr. Montgomery, PP. 4 & 5, Q. 18) that from the history and his medical training and experience the injury of January 2, 1967, was the cause of the hernia; (Dep. Dr. Montgomery, PP. 5 & 6, Qs. 20 & 21)

that he advised Mr. Sullivan, Chief of Police and one of the defendants-appellees herein, that the plaintiff-appellant was unable to perform the duties of a policeman; (Dep. Dr. Montgomery, P. 6, Q. 23) that he subsequently on December 13, 1967, wrote Mr. Sullivan a letter advising him the plaintiff-appellant was unable to do any heavy lifting; (Dep. Dr. Montgomery, PP. 7 & 8, Q. 24) that he saw the plaintiff-appellant on March 11, 1970, when he still had pain in his right groin at which time he felt the plaintiff-appellant should never return to his job as a policeman; (Dep. Dr. Montgomery, PP. 7 & 8, Q. 25) Dr. Montgomery last saw the plaintiff-appellant on October 4, 1971, and testified that in his opinion the plaintiff-appellant was permanently totally disabled to perform the duties of a policeman; (Dep. Dr. Montgomery, PP. 10 & 13, Qs. 28 & 31) Dr. George E. Ainsworth testified that he first saw the plaintiff-appellant on May 22, 1968, and examined him for the Workmen's Compensation Board; (Dep. Dr. Ainsworth, P. 3, Q. 2) that the plaintiff-appellant first had trouble with his back in 1939 and had a ruptured disc removed in 1944 and had no further difficulty until 1964 when he was hurt while performing his duties as a policeman and again was injured on January 2, 1967, while on duty as a policeman which injury lighted up or aggravated his previous existing back difficulty; (Dep. Dr. Ainsworth, PP. 3-6, Q. 3) that at that time it was his opinion that the plaintiff-appellant had a 100% occupational disability; (Dep. Dr. Ainsworth, PP. 6 & 7, Q. 6) that he again saw the plaintiff-appellant on April 21, 1970, at which time in his opinion the plaintiff-appellant was totally occupationally disabled; (Dep. Dr. Ainsworth, PP. 7 & 8, Qs. 10 & 12) that the plaintiff-appellant's condition was of a permanent nature; (Dep. Dr. Ainsworth, P. 9, Q. 14) the plaintiff-appellant testified that due to his condition he was unable to do anything; (Tr. Rec. P. 26, Ls. 8-12) that he was awarded total permanent disability by the Workmen's Compensation Board for injuries arising out of his employment for the City of Mayfield, Kentucky as a police officer; (Dep. Silas Redmond, P. 11) that the last day he was active as policeman for the City of Mayfield, Kentucky was December 8, 1967, but that he was not fired nor was his employment terminated as far

as he knew and if he were able to perform the duties of a policeman he could return to work. (Tr. Rec. PP. 19 & 20, Ls. 19-25, 1-14).

At the hearing before the Board Of Trustees Of The Policemen's And Firemen's Pension Fund the following transpired when said Board was acting as the fact finder.

MR. MANGRUM: I would like to say this, I want to read you all myself — As I said in the beginning, you all are kind of functioning as a jury. If you were a jury the Court would give you instructions, but since the Court is not present and you are in substance the Court as well as the jury, you are a fact determining body, I would like to read to you verbatim the applicable sections of the pension fund—

MR. NEELY: Is this in the way of argument?

MR. MANGRUM: No, you will make the argument first, but this is section 95.550 Pensions For Disability Or Death In Cities Of The Third Class Beneficiaries — Amounts —

MAYOR ANDERSON: Also this stuff he's reading doesn't actually apply to our operation of this Board, does it?

MR. MANGRUM: It does. This is the statute and this is the thing that tells what you are to find.

MR. NEELY: Each member has a copy of the statute.

MR. MANGRUM: This is a hearing required in Northfield V. Holiday Manor, Incorporated —

MAYOR ANDERSON: We are not interested in those. We are up here to try to work this thing out as fair as we know how and we are not going to sit here all afternoon three or four times and listen to this philandering.

MR. MANGRUM: It's my job to state the case.

MAYOR ANDERSON: I'm not going to sit here and listen to it.

MR. MANGRUM: You have an obligation to perform. This case I am quitting is Northfield V. Holiday Manor, Inc. This is a Kentucky case. (479 S.W. 2d 596, a 1972 case).

MR. NEELY: Louis, if you want to brief this — you are going into argument.

MR. MANGRUM: I want to tell them what is necessary. It says, "Due process requires a hearing wherein there is a finding of facts." Actually you all must make a determination of the facts. This is Kentucky law I am quoting. I am trying to help you because this is the law.

MAYOR ANDERSON: We have copies of that law.

MR. MANGRUM: As I said once before, you made copies of the depositions but I want to show you here this as a body, but it said this —

MAYOR ANDERSON: I'm not going to sit here and listen to this all afternoon and the rest of the men are on duty.

MR. MANGRUM: You have done taken up more time than it will take to read this. This is only one paragraph.

MAYOR ANDERSON: I am not interested.

MR. MANGRUM: It says under (b) "If any member of the police or fire department becomes permanently disabled, physically or mentally, while in the performance of duty and by reason of service in the department, so as to render necessary his retirement from service in the department, the Board of Trustees shall retire him from service and order paid to him monthly fifty percent of his monthly salary at the time of his retirement. Provided, however, that the provisions of this paragraph shall not apply unless the disabled fireman or policeman has served from one

day to ten years consecutively in his department such period of service to be fixed by the Board." One last comment here on this that will help you in Attorney General's Opinion No. 40512 —

MR. NEELY: They have got a right to apply the law themselves.

MR. MANGRUM: But I am advising them myself.

MR. NEELY: They have everyone got copies.

MR. MANGRUM: Not of this.

MR. NEELY: I guarantee you they have copies of that. These people know these statutes better than you and I do.

MR. MANGRUM: This is just one little paragraph: "The general rule is that disability must bear some relationship to the duties performed by the applicant while in service before qualifying for benefits. And, of course, that is a question of fact which would require proof and medical testimony which should be presented to the Board." That was Attorney General's Opinion No. 40512 if anybody wants a copy. That is actually the fact determination that you all should make is (1) Is the gentleman totally disabled from work as a police officer; (2) Is that associated with his duties as a police officer, and if so, you should award him his pension benefits in my opinion as to the law. Mr. Neely will argue the case and I will conclude as to the facts. We rest the case. (Tr. Rec. PP. 49-53, Ls. 17-25, 1-25, 1-25, 1-25, 1-3).

MR. MANGRUM: I have no further questions.

MR. NEELY: I don't have any questions. These men are worn out and I am not going to argue the case. I'll tell the Chairman right now, a circuit judge has a right to put any limit he wants to on the time for arguments and as far as any statement that anyone might make in the way of a closing statement that's within the discretion of

the Chairman of the Board. You men have read the statute and all of you have a copy of it and you are going to have copies of the depositions and you can take it and read it and you have copies of the Minutes and you are capable of making your decision in this matter.

MR. MANGRUM: I would say fifteen minutes would be sufficient for me to cover the evidence.

FIRECHIEF DOWDY: We can't decide it right now?

MR. NEELY: We can set a time limit.

MR. MANGRUM: Fifteen minutes.

MR. NEELY: I think five or ten is sufficient; you set it, Howard.

FIRECHIEF DOWDY: I believe ten minutes. We are worn out. (Tr. Rec. PP. 62 & 63, Ls. 7-25, 1-3).

The issue of 'due process of law' as shown above was first raised before the defendants-appellees at the initial hearing and it along with the other issues presented herein were raised before the Graves Circuit Court in the pleadings which are set out verbatim in the Appendix. The issues herein were raised before the Court of Appeals of Kentucky in the plaintiff-appellant's brief and were presented to the Supreme Court of Kentucky in the plaintiff-appellant's Motion For Discretionary Review. (Tr. Rec. PP. 197-212).

The defendants-appellees as shown herein conducted the hearing in such way and manner as to make it violate due process of law under the 14th Amendment to the Constitution of The United States which is as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or en-

> force any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The defendants-appellees also violated the Constitution of Kentucky Articles 2 and 14 which are as follows:

Article 2. Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

Article 14. All courts shall be open and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

The Graves Circuit Court did not specifically rule on the issues raised herein but did infer that KRS 95.540 was to be considered and justified its findings on the merits of the case as shown by its Findings Of Fact And Conclusions Of Law and Judgment appearing verbatim in the Appendix.

The Court Of Appeals Of Kentucky likewise did not specifically rule on the issues raised herein and turned to the doctrine of equitable estoppel to justify its affirmance of the Judgment of the Graves Circuit Court but did infer that the law required the City of Mayfield, Kentucky to establish a pension fund and that the plaintiff-appellant had been an employee long enough to entitle him to the benefits under the law as shown by its opinion appearing in the Appendix verbatim.

The Supreme Court of The Commonwealth Of Kentucky affirmed the Judgment of the Court Of Appeals Of Kentucky by denying the plaintiff-appellant's Motion For Discretionary Review as shown by its Order appearing in the Appendix verbatim.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The federal questions presented herein are substantial all of which involve 'due process of law' which calls for a determination in most every particular case, in that issue number 1 pertains to the nature of the hearing provided. Issue number 2 involves arbitrary action by the fact finder and under the facts of this case at present raises the issue of whether or not the Court Of Appeals Of The Commonwealth of Kentucky evaded the constitutional issues by deciding the case on the ground of equitable estoppel which itself presents this Court with a federal question as to whether or not the evidence in this case supports such finding as shown by the case of Ancient Egyptian Arabic Order Of Nobles Of The Mystic Shrine V. Michoux, 49 S. Ct. 485, 279, U. S. 737, 73 L. Ed. 931, 1922, in which the facts are the negro order was created by Act of Congress in 1870 and the white order had existed subsequent to Colonial days; the white order sued to enjoin the negro order from using any part of the name; the trial Court and Courts below applied commercial law and held that the white order was not estopped by laches as the negro order was trying to defraud the white order by the use of its name making it appear it was a part of the same order and issued the injunction; this Court examined the evidence and held that said findings by the state courts were not supported by same and that all of the evidence was to the contrary; the case was reversed and remanded with directions.

The plaintiff-appellant points out that the issue of equitable estoppel was not raised by either party to this action and was never briefed or treated as an issue prior to the decision of the Court of Appeals Of Kentucky.

To the same effect is the case of Radio Station WOW V. Johnson, 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092, 1922.

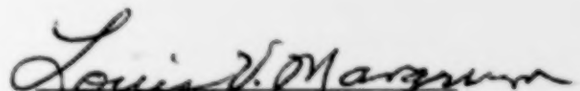
Issue number 3 presented herein involves the question of whether or not KRS 95.540 as applied in this case

is unconstitutional as it violates 'due process of law' in that both the nature of the hearing and the arbitrariness of the findings on the merits have been held to be justified by said statute by the decisions of the Courts below.

For the reasons discussed herein the plaintiff-appellant contends that this Court should note jurisdiction of this case and enter an order where same can be briefed and decided on the merits of the case.

Wherefore, plaintiff-appellant demands, that this Court find that it has jurisdiction in this case and enter an order to that effect so this case may be decided on the merits by this Court along with the relief to which he is entitled.

Respectfully submitted,



Louis V. Mangrum, counsel
for plaintiff-appellant,
Silas W. Redmond

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COMMONWEALTH OF KENTUCKY
GRAVES CIRCUIT COURT
Civil Action No. 5910

SILAS W. REDMOND, APPELLANT

VS. COMPLAINT AND PETITION OF APPEAL

ROBERT WHEELER, C. P. SULLIVAN, HOWARD DOWDY, JAMES ALEXANDER, JR., E. A. ROSS AND E. W. ANDERSON, JR., BOARD OF TRUSTEES OF THE POLICEMEN'S AND FIREMEN'S PENSION FUND FOR THE CITY OF MAYFIELD, KENTUCKY, APPELLEES

Now comes the appellant, Silas W. Redmond, by his attorney, Louis V. Mangrum, and states as follows:

1.

The appellant, Silas W. Redmond, states that the appellees, Robert Wheeler, C. P. Sullivan, Howard Dowdy, James Alexander, Jr., E. A. Ross and E. W. Anderson, Jr., Board Of Trustees Of The Policemen's And Firemen's Pension Fund For The City Of Mayfield, Kentucky, entered in the Minutes Of The Meeting Of The Policemen's And Firemen's Pension Fund which is dated July 27, 1972, its findings in regard to the appellant's claim for disability benefits under KRS 95.620 and KRS 95.520 and the related sections of Chapter 95; that KRS 95.540 is as follows:

"(1) The Board of Trustees of the Pension Fund in Cities of the Third Class may make all necessary rules for its government in the discharge of its duties, and shall hear and decide all applications for benefits or pensions. Its decision on these applications shall be conclusive, and not subject to revision or reversal, except by the Board. A record shall be kept of the meetings and proceedings of the Board."

2.

The appellant further states that KRS 95.540 is unconstitutional as it denies the appellant a property right under his contract of employment as KRS 95.520 in part is, "(1) There shall be in cities of the third class a policemen's and firemen's pension fund, and a board of trustees for that fund," which became effective on June 16, 1966, at which time the appellant, Silas W. Redmond, was on active duty as a police officer for the City of Mayfield, Kentucky and vested his rights to same at said time as it became a part of his contract of employment; that the Court Of Appeals in the case of Miller v. Price, 282 Ky. 611, 139 S.W. 2d. 450, 1940, held KRS 95.540 constitutional where the evidence was to the effect that he did not receive the injury that disabled him in the course of his employment but that case has no application to the case now before this Court as the evidence in this case as well as the law is to the effect that the appellant did receive the injury that brought about his disability in the course of his employment; that KRS 95.550 (b) is as follows:

"(b) If any member of the police or fire department becomes permanently disabled, physically or mentally, while in the performance of duty and by reason of service in the department, so as to render necessary his retirement from service in the department, the board of trustees shall retire him from service and order paid to him monthly fifty percent of his monthly salary at the time of his retirement. Provided, however, that the provisions of this paragraph shall not apply unless the disabled fireman or policeman has served from one day to ten years consecutively in his department, such period of service to be fixed by the board"; that the appellant has met the requirements under the law and is entitled to a pension for disability.

3.

The appellant further states that where the action of a Board of Trustees is arbitrary that Statutes like KRS 95.540 are not given any effect by the Court of Appeals to prevent same from denying the claimant due process of

law as is shown by the case of King v. Sermonis and Department of Highways v. Hall and Department of Highways v. Cornett, 481 S.W. 2d. 652, 1972; that the action of the appellees in the case now before this court is arbitrary in that it found "that this pension fund is a bounty springing from the appreciation and graciousness of the sovereign even when contributions from the employee's salary are made, but particularly this is true with respect to Silas W. Redmond in view of the fact that there has never been any contribution from his salary to this fund"; where it is shown that he last worked on December 8, 1967, some eighteen months subsequent to the law making it mandatory that the City of Mayfield establish a pension fund which it refused to do until ordered to do so by the Graves Circuit Court on July 25, 1968, resulting in an Ordinance to that effect passed on November 11, 1968; that the action of the appellees is arbitrary in finding that "said Silas Redmond's disability was not due to his service in the department, but was triggered by injuries received by him prior to his service in the police department, which over a period of years has caused his back, foot and spine to degenerate through natural processes, and his hernia condition was not the result of employment with the city"; when the Workmen's Compensation Board found his injury was "within the scope of his employment on January 2, 1967, when lifting a person into a police vehicle . . . The Board appointed physician, Dr. George Ainsworth, in an excellent and detailed report, and there were no objections raised to said report, was of the opinion that the January 2, 1967, injury aggravated plaintiff's pre-existing back injury so that he is now totally disabled"; that by law the appellees should be bound by said Workmen's Compensation Board's determination as is shown by C. J. S. Municipal Corporations §727 (f) and the cases of Sullivan v. Board Of Estimate And Apportionment of City Of New York, 3 N. Y. 2d. 296, 253 App. Div. 591 and Dempsey v. City of Harrisburg, No. 70-62, Ill., Ct. Bulletin, January, 1972; that the determination of the appellees whereby they denied the appellant his pension for disability is arbitrary in that it is not supported by substantial evidence of probative value in the record.

The appellant further states that he was denied due process of law at the hearing in this case before the appellees as E. W. Anderson, Jr., one of the appellees and a member of the Board Of Trustees Of The Policemen's And Firemen's Pension Fund For The City Of Mayfield, Kentucky who was trying said case, during the hearing proclaimed that he would not listen to counsel for the appellant and denied him a fair hearing at which time appellant's counsel could not object to such conduct without prejudicing the appellant's case with said appellees more than had been done by the action of E. W. Anderson, Jr.

WHEREFORE, appellant demands:

1. That this Court reverse the decision of the appellees and remand this case to said appellees with instructions to award the appellant, Silas W. Redmond, his pension pursuant to KRS 95.550 (b) with all back pay from the date he became disabled to date hereof.

2. Any and all relief to which he is entitled.

Louis V. Mangrum
Attorney for Appellant
Mangrum Building
Mayfield, Kentucky 42066
Tel. 502-247-6702

COMMONWEALTH OF KENTUCKY
GRAVES CIRCUIT COURT
CIVIL ACTION NO. 5910

SILAS W. REDMOND — APPELLANT

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

ROBERT WHEELER, C. P.
SULLIVAN, HOWARD DOWDY,
JAMES ALEXANDER, JR.,
E. A. ROSS, E. W. ANDERSON, JR.,
BOARD OF TRUSTEES OF THE
POLICEMEN'S AND FIREMEN'S
PENSION FUND OF THE CITY OF
MAYFIELD, KENTUCKY, — APPELLEES

This case having been submitted to the Court for trial on the Appellant's appeal from a denial of a disability pension by the Board of Trustees of the Policemen's and Firemen's Pension Fund of the City of Mayfield, Kentucky, pursuant to KRS 95.550(1)(b), and the Court having studied the pleadings and proof therein and further having reviewed the Board of Trustees of the Policemen's and Firemen's Pension Fund for the City of Mayfield, Kentucky's Motion to Dismiss, which was originally set for hearing on October 6, 1972, and has been pending, doth now make the following Findings of Fact and Conclusions of Law herein in rendering its decision.

FINDINGS OF FACT

(1) Silas W. Redmond was employed by the City of Mayfield, Kentucky (a city of the third class) as a policeman in the police department of said city on October 1, 1952.

(2) The said Silas W. Redmond ceased his work as a policeman for the police department of the City of May-

field, Kentucky on December 8, 1967, because said Redmond refused to lift anything and to make any ambulance calls (said ambulance calls at that time were handled by the police department of the City) and since he declined to perform these acts, which were a part of his duties, he was directed to go home by the police chief.

(3) From that day forward he never returned to his place of employment and never made any attempt to perform the duties required of him and never called to give any reason why he had not resumed his employment or his duties as a policeman and said duties had to be assumed by other officers in the department and by new policemen employed for this position.

(4) That by reason of the actions on the part of Silas W. Redmond, the City of Mayfield, Kentucky, assumed that he abandoned his position as of December 8, 1967, the last day he reported for duty.

(5) That on December 14, 1967, a case styled **Herschel Givens, et al -v- City of Mayfield,** Graves Circuit Court, Civil Action No. 4440, in which a demand was made upon the City of Mayfield that it establish a policemen's and firemen's pension fund, pursuant to KRS 95.520-95.620, retroactive to June 6, 1966, the effective date of certain amendments to KRS 95.520-95.620, and in a Judgment filed in Civil Action No. 4440 in the above case on July 25, 1968, the Court did require that the City of Mayfield, Kentucky establish a policemen's and firemen's pension fund in accordance with KRS 95.520-95.620.

(6) The Court, in its judgment rendered on July 25, 1968, declined to make this obligation for establishing this policemen's and firemen's pension fund for the City of Mayfield, Kentucky retroactive but did require that a Policemen's and Firemen's Pension Fund be adopted by the City pursuant to KRS 95.520-95.620.

(7) By ordinance passed on November 11, 1968, the City of Mayfield, Kentucky established a Policemen's and Firemen's Pension Fund pursuant to KRS 95.520-95.620

and the plan became effective on January 1, 1969, pursuant to the provisions of said ordinance.

(8) Prior to July 27, 1972, the said Silas W. Redmond filed his claim before the Board of Trustees of the Policemen's and Firemen's Pension Fund for the City of Mayfield, Kentucky, and the said Board held a hearing with respect to the claim of Silas W. Redmond on July 27, 1972, at which time the testimony of Silas W. Redmond and Cleatus Sullivan were heard and in addition, prior thereto, the plaintiff took the depositions of Silas Redmond, Dr. Wally O. Montgomery and Dr. George E. Ainsworth, and by resolution duly passed by said Board, the following decision was rendered:

> The claim of Silas W. Redmond for a disability pension pursuant to KRS 95.550 having been pending before the Board of Trustees of the Mayfield Policemen's and Firemen's Pension Fund coming on for consideration before the Board, said Board doth now find as follows:
>
> 1. That the said Silas W. Redmond's last day of work with the City of Mayfield, Kentucky, was on December 8, 1967, which was several weeks before a suit was filed in the Graves Circuit Court on December 14, 1967, in a suit styled Herschel Givens, et al, vs. City of Mayfield, Graves Circuit Court, Civil Action No. **4440,** demanding that the City of Mayfield, Kentucky, establish a policemen's and firemen's pension fund pursuant to KRS 95.550 thru 95.620, and after Judgment of the Graves Circuit Court on July 25, 1968, directing that the pension fund be established, said Policemen's and Firemen's Pension Fund was established by the City of Mayfield, Kentucky, by ordinance passed on November 11, 1968, which was approximately one year after the last year of service of Silas W. Redmond as a policeman for the City of Mayfield, Kentucky, and it is the opinion of this Board that this pension fund is a bounty springing from the appreciation and

graciousness of the sovereign even when contributions from the employee's salary are made, but particularly this is true with respect to Silas W. Redmond in view of the fact that there has never been any contribution from his salary to this fund.

2. The board is also of the opinion that the said Silas Redmond's disability was not due to his service in the department, but was triggered by injuries received by him prior to his service in the police department, which over a period of years has caused his back and spine to degenerate through natural processes.

3. The board also takes notice of the fact that the said Silas W. Redmond began his service with the Mayfield Police Department on October 1, 1952. and as set out above, his last day of actual employment with the City of Mayfield, Kentucky, was on December 8, 1967, and this board takes judicial notice of the fact that throughout this period, the said Silas W. Redmond, along with all other employees of the City of Mayfield, Kentucky, including policemen and firemen, were covered by Social Security and since the said Silas W. Redmond is now approximately sixty-three years of age, he is entitled to retirement benefits from the Social Security Administration by reason of his employment with the City of Mayfield, Kentucky, provided timely application is made.

Motion made by Cleatus Sullivan, seconded by Robert Wheeler that the application of Silas W. Redmond for a disability pension with the Policemen's and Firemen's Pension Fund be denied and that the above mentioned opinion of the Board of Trustees of the Policemen's and Firemen's Pension Fund with respect to the application of Silas W. Redmond for a disability pension pursuant to KRS 95.550 be adopted and with vote being taken and all members of the Board being present, all voted aye.

(9) Thereafter, in the case styled in the caption of these Findings of Fact and Conclusions of Law, the said Silas W. Redmond filed his Complaint and Petition for Appeal in the Graves Circuit Court on September 6, 1972, and the testimony taken herein was reviewed by the Judge of the Graves Circuit Court.

(10) That the City of Mayfield, Kentucky appears to have been justified in assuming that the said Silas W. Redmond abandoned his position on December 8, 1967, since he didn't again attempt to report for duty and the pension fund was not established by the City of Mayfield, Kentucky, by ordinance until approximately one year later, which was on November 11, 1968, after which, on January 1, 1969, the Policemen and Firemen of the City of Mayfield, Kentucky began to contribute the sum of 4% of their salary to the Policemen's and Firemen's Pension Fund and beginning with the tax year 1969 the City of Mayfield, Kentucky levied a $.03 ad valorem tax as the taxpayer's contribution to said fund and the said Silas W. Redmond, by reason of abandoning his position with the Police Department on December 8, 1967 (more than one year before said Fund became effective) never made any contribution thereto and thus has never contributed one cent of his salary to the Policemen's and Firemen's Pension Fund.

(11) The Board of Trustees of the Policemen's and Firemen's Pension Fund of Mayfield, Kentucky, found that the disability of Silas W. Redmond was not due to his services in the department but was triggered by injuries received by him prior to his service in the department which, over a period of time has caused his back and spine to degenerate through natural processes and the Court is aware of the fact that the Board had the opportunity to observe the claimant and also in view of other findings of fact and conclusions of law herein, particularly with respect to the

opinion of this Court that the said Silas W. Redmond is not covered by this Pension Fund since he made no contribution thereto and also in view of the KRS 95.540(1) there appears to be no reason to disturb this finding on the part of the Board.

(12) That as soon as the City of Mayfield could legally do so during the early part of the 1950s, an ordinance was adopted placing all of its employees, including the policemen and firemen, under Social Security. The City of Mayfield, Kentucky, is one of the few cities in which firemen and policemen are entitled to Social Security benefits by reason of their employment in said department and the said Silas W. Redmond is now over the age of 65 years and is entitled to full benefits under the Social Security Act.

CONCLUSIONS OF LAW

(1) That Kentucky Revised Statute 95.540(1) reads as follows:

> The board of trustees of the pension fund in cities of the third class may make all necessary rules for its government in the discharge of its duties, and shall hear and decide all applications for benefits or pensions. **Its decision on these applications shall be conclusive, and not subject to revision or reversal, except by the board.** A record shall be kept of the meetings and proceedings of the board. (Emphasis ours)

(2) That in construing this statute, the case of **Rohe v. City of Covington, et al,** 255 Ky. 164, 73 SW2d, 19, concluded as follows:

> Indeed the granting of a pension in the first instance does not stand on the plane of a contract right or right vested by statute. A pension is a bounty springing from the appreciation and graciousness of the sovereign, and may be given

> or withheld at its pleasure. People ex rel Donovan v. Retirement Board P. A. & B. F., 326 Ill. 579, 158 N. E. 220, 54 A. L. R. 940. It is for the Legislature to say what classes of persons and conditions on which they will be granted. Statutes creating a pension fund for policemen and firemen usually place in the hands of the pension board created to manage and control the fund the power to determine who shall be entitled to the pension benefits and make its action in such matters final and conclusive. As a provision to that effect is well within the legislative power, the remedy is exclusive, and the civil courts are without jurisdiction to review the judgment of the board. U. S. v. Babcock, 250 U. S. 328, 39S. Ct. 464,63 L. Ed. 1011; State v. Fireman's Pension Fund, 117 LS. 1071, 42 So. 506 8 Ann. Cas. 945. For these reasons we held in Board of Trustees v. McCrory, 132 Ky. 89, 116 S. W. 326, 21 L. R. A. (N. S.) 583, that, where the statute makes the decision of the Board final, mandamus will not lie to control its action, even though the Court may be of the opinion that the board erred in refusing to grant the pension. Being without jurisdiction, we cannot review the facts even though the members of the board arbitrarily, unlawfully and in fraud of plaintiff's rights, and contrary to the provisions of the law and facts presented to them, rejected the plaintiff's claim. It follows that the demurrer to the petition as amended was properly sustained.

(3) This holding of the court in the above styled case is also sustained in the case of **Miller -v- Price, et al,** 139 SW2d, 450, and **Bishop v. Markham, Mayor, et al,** 272 Ky., 322, 114 SW2d, 126.

(4) The court further concludes that the said Silas W. Redmond, as a matter of law, abandoned his position on December 8, 1967, when he took the position that he was unable to do the duties required of him as a regular police-

man and went home, and never again reported for duty or inquired about his position as a policeman and another policeman had to be employed to perform the duties formerly required of him.

(5) That Silas Redmond ceased his employment with the City of Mayfield, Kentucky on December 8, 1967, which was approximately one year before the adoption by ordinance of the Policemen's and Firemen's Pension Fund pursuant to KRS 95.520 through 95.620, on November 11, 1968, and the Court did not require this action on the part of the City to be retroactive, and the said Silas Redmond never was an employee of the City while this Pension Fund was in effect, and never made any contribution to the Fund because the contributions on the part of the policemen and firemen to the Pension Fund did not begin until January 1, 1969, which was more than a year from the last date of his employment on December 8, 1967, and it would not be equitable for him to receive a pension under KRS 95.520 through 95.620 when he never made any contribution thereto as the other recipients to the pension fund have done.

(6) In view of the Conclusions of Law heretofore set out and also in view of the fact that the Board of Trustees for the Policemen's and Firemen's Pension Fund had an opportunity to observe the appellant throughout his employment and throughout this hearing, the Court sees no reason to disturb the findings of the Board of Trustees with respect to the fact that the disability of the said Silas W. Redmond was not due to his services in the department and was actually a result of injuries received prior to his services with the police department which over a period of years had caused his back and spine to degenerate through natural processes and thus his disability was not a result of his performance of duties as a policeman and by reason of his services in the department.

(7) Even though this Court finds that the decision of the Board of Trustees for the Policemen's and Firemen's Pension Fund in this case is final, pursuant to KRS

95.540(1), the Court further finds that the Board of Trustees for the Policemen's and Firemen's Pension Fund of the City of Mayfield, Kentucky, did not abuse its discretion or act arbitrarily in rendering its decision.

(8) A final Order or Judgment may be drawn substantiating the Appellees Motion to Dismiss this action filed on September 27, 1972, for the reasons therein set out.

Seth T. Boaz,
JUDGE, Graves Circuit Court

Entered April 27, 1976

COMMONWEALTH OF KENTUCKY
GRAVES CIRCUIT COURT
CIVIL ACTION NO. 5910

SILAS W. REDMOND — APPELLANT

V — JUDGMENT

ROBERT WHEELER, C. P. SULLIVAN, HOWARD DOWDY, JAMES ALEXANDER, JR., E. A. ROSS, E. W. ANDERSON, JR., BOARD OF TRUSTEES OF THE POLICEMEN'S AND FIREMEN'S PENSION FUND OF THE CITY OF MAYFIELD, KENTUCKY — APPELLEES

By reason of the study of the entire record of this case upon submission and of the Findings of Fact and Conclusions of Law set out herein and after a further study of the Motion to Dismiss filed by the Appellees herein, IT IS HEREBY ADJUDGED that the findings of the Board of Trustees of the Policemen's and Firemen's Pension Fund of the City of Mayfield, Kentucky with respect to the claim of Silas W. Redmond for a pension pursuant to KRS 95.550(1)(b), shall not be disturbed by this Court and the Board's findings are further hereby sustained.

Seth T. Boaz,
JUDGE, Graves Circuit Court

Entered April 27, 1976

OPINION RENDERED: January 7, 1977

COURT OF APPEALS OF KENTUCKY
NO. CA-99-MR

SILAS W. REDMOND — APPELLANT

VS. — APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE SETH T. BOAZ, JUDGE
CIVIL ACTION NO. 5910

ROBERT WHEELER, et. al. — APPELLEES

AFFIRMING

* * * * * *

BEFORE: HAYES, LESTER and PARK, Judges

PARK, JUDGE. This litigation arises out of a claim filed by the appellant, Silas W. Redmond, before the appellees who are members of the Board of Trustees of the Policemen's and Firemen's Pension Fund for the City of Mayfield. Redmond was a former policeman of the City of Mayfield, and he sought to recover permanent disability payments pursuant to KRS 95.550 (1) (b). After a hearing, the Board of Trustees denied Redmond's application for a disability pension. Redmond then initiated this litigation by filing a "complaint and petition of appeal" in the Graves Circuit Court. The circuit court concluded that the actions of the Board of Trustees were supported by the record of the proceedings before the Board. Redmond appeals from the judgment entered by the circuit court sustaining the actions of the Board of Trustees of the Policemen's and Firemen's Pension Fund.

Redmond was employed as a policeman by the City of Mayfield on October 1, 1952. Redmond continued to serve as a policeman for the City of Mayfield until December 8, 1967. At that time, Redmond was unable to continue to carry out his duties as a policeman because of physical disabilities. It has been Redmond's contention that

these physical disabilities are attributable to injuries sustained by him in the performance of his duties as a policeman.

When Redmond ceased performing any duties as a policeman on December 8, 1967, the City of Mayfield had no pension fund for policemen. Rather than provide a pension fund, the City of Mayfield had afforded Social Security coverage for its policemen and firemen.

For many years, the City of Mayfield had been classified as a city of the third class. As a city of the third class, the City of Mayfield was subject to the following provisions of KRS 95.520(1):

> "There shall be in cities of the third class a policemen's and firemen's pension fund and a board of trustees for that fund."

Assuming that the city was under a mandatory duty to establish a pension fund, Redmond asserts that he is entitled to a disability pension under the following provisions of KRS 95.550(1)(b):

> "If any member of the police or fire department becomes permanently disabled, physically or mentally, while in the performance of duty and by reason of service in the department so as to render necessary his retirement from service in the department, the board of trustees shall retire him from service and order paid to him monthly fifty percent of his monthly salary at the time of his retirement. Provided, however, that the provisions of this paragraph shall not apply unless the disabled fireman or policeman has served from one day to ten years consecutively in his department, such period of service to be fixed by the board."

As he had served more than ten years prior to the date of his claimed disability, Redmond claims that he is entitled

to the disability pension even though the city had not established a policemen's and firemen's pension fund on December 8, 1967.

On December 14, 1967, two city employees filed an action in the Graves Circuit Court to require the City of Mayfield to establish a policemen's and firemen's pension fund pursuant to KRS 95.520 et seq. Redmond was not a party to this action, although it purported to be brought as a class action on behalf of all of the policemen and firemen in the City of Mayfield. On July 25, 1968, the Graves Circuit Court entered a judgment requiring the city to establish a policemen's and firemen's pension fund. In the complaint in the earlier action, the plaintiff sought to require the City of Mayfield to establish the pension fund retroactive to June 16, 1966, the effective date of certain statutory amendments. However, in its judgment requiring the city to establish a pension fund, the Graves Circuit Court did not require the City of Mayfield to make the pension fund retroactive to June 16, 1966. No appeal was taken from this judgment.

On November 11, 1968, the City of Mayfield enacted an ordinance establishing a policemen's and firemen's pension fund as required by the judgment of the Graves Circuit Court. With respect to the funding of the pension fund, the city had the following discretion under KRS 95.580(1):

> "The policemen's and firemen's pension fund in cities of the third class shall consist of: (a) The proceeds of an annual tax, which may be levied by the city legislative body, of not less than one cent (1c) nor more than four cents (4c) on each $100.00 in value of taxable property. (b) All reward, fees, gifts and emoluments paid or given on account of extraordinary service of any member of the police or fire department. (c) Assessments, which the board of trustees of the pension fund may make, upon each member of the police and fire departments, of not less than one per-

cent (1%) nor more than four percent (4%) of his salary, to be withheld from the monthly salary and paid by the city treasurer into the pension fund."

Under the enabling ordinance, the pension fund was not funded until January 1, 1969, when the city commenced deducting four percent of each fireman's and policeman's salary and levied a special three cent tax on each $100.00 in value of taxable property, as authorized by KRS 95.580(1). Redmond filed his claim for a pension on August 28, 1969.

The board of trustees of the pension fund and the circuit court both concluded that Redmond was not entitled to any benefits from the pension fund because he was not an active policeman on the date the fund was established and because he never made any contributions to the fund. Redmond argues that this permits the City of Mayfield to benefit by its own failure to carry out its duty to establish the pension fund.

Even though the city had a mandatory duty to establish the pension fund, the city did have discretionary powers relating to the fund. It was within the discretion of the city to determine the special tax rate, within a maximum and minimum rate, and it was within the discretion of the city to determine the employee contribution, again within a maximum and a minimum limit. The city also had discretion to determine the length of service required before a policeman would be entitled to a disability pension although Redmond's period of service did exceed the ten year maximum service limitation provided by KRS 95.550(1)(b).

The Pennsylvania Supreme Court was faced with a similar problem in **Commonwealth v. Council of City of Beaver Falls**, 355 Pa. 164, 49 A. 2d 365 (1946). The Supreme Court of Pennsylvania stated:

"The legislative scheme for the establishment and maintenance of police pension funds is

obviously based upon the principal of joint contributions by the policemen and the city. The Third Class City Law directs that the fund is to be maintained by a monthly charge against each member of the police force and also that a payment is to be made annually of a certain proportion of the taxes collected by the city. While, on first impression, it might seem that where a city has, either wilfully or negligently, failed to carry out the obligations imposed upon it by statute, as here for a period of ten years, it should, however belatedly, be compelled to perform retroactively the duty which it has thus neglected or defied. But, as a practical matter and as far as the present case is concerned, the original situation cannot be restored in a way to make possible a satisfactory remedy for the condition caused by the city's delinquency. The sums which should have been deducted from the wages of the policemen cannot now be recaptured, and the personnel of the force has undoubtedly suffered changes during that ten year span. To establish, therefore, a fund for those years which would consist only of contributions now to be made by the city and thus give to the policemen benefits toward the realization of which they did not make any payments whatever into the fund, would be to provide a fund not constituted in a manner contemplated by the law, for, while the amount to be paid in by the policemen was to be left to the discretion of the city authorities, the statute clearly designs that some such payments should be made and that the retirement allowances to the policemen should not become mere gratuities on the part of the taxpayers. Since the council of Beaver Falls cannot now effectively exercise a discretion in regard to the payments which the policemen themselves should have made, it should not be compelled to exercise such a discretion with regard to the payments which the city

should have contributed. Laches may, under some circumstances, be imputed to the Commonwealth as well as to individuals (Commonwealth ex rel. Attorney General v. Bala & Bryn Mawr Turnpike Co., 153 Pa. 47, 25 A. 1105; Bailey's Estate, 241 Pa. 230, 88 A. 428; Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia, 327 Pa. 497, 513, 194 A. 661, 669), and here, for twelve years, no action was taken to enforce the city's obligations although the members of the police force could presumably have induced the Commonwealth at any time during that period to bring the proceedings on their behalf which it has now instituted. To disregard that delay would be to allow the parties who alone are to reap the benefits of the fund to escape bearing their share of the necessary burden, and, as neither the letter nor the spirit of the law can now be retroactively enforced as a whole, to enforce a partial performance of it would obviously meet the requirements neither of justice nor of practicality."

The reasoning of the Supreme Court of Pennsylvania applies with equal force to the facts in this case. As it relates to cities of the third class, KRS 95.520 to 95.620 had remained essentially unchanged since 1956. See 1956 Kentucky Acts, Chap. 31. The constitutionality of such legislation had been recognized since the decision in **Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Paducah v. City of Paducah,** Ky., 333 S.W. 2d 515 (1960). Yet, while employed as a policeman, Redmond never made any claim that the City of Mayfield should establish a pension fund. Even if Redmond is not bound by the judgment in the earlier class action which refused to make the establishment of the pension fund retroactive, neither justice nor practicality require that Redmond be entitled to share in a pension fund which was not established until long after he ceased to be an active policeman and to which he never contributed.

The court concludes that the circuit court did not err in dismissing Redmond's complaint.

The judgment of the circuit court is affirmed. All concur.

ATTORNEY FOR APPELLEES:

Sam Boyd Neely
City Attorney
238 North Seventh Street
Mayfield, Kentucky 42066

ATTORNEY FOR APPELLANT:

Louis V. Mangrum
Mangrum Building
Mayfield, Kentucky 42066

COURT OF APPEALS OF KENTUCKY

ORDER

Whereas recent weather conditions have prevented the mailing of opinions rendered by the Court of Appeals on January 7, 1977, until the present date,

IT IS HEREBY ORDERED that for purposes of motions for discretionary review pursuant to RAP 1.180 and petitions for rehearing, modification, or extension pursuant to RAP 1.350, opinions rendered on January 7, 1977 shall be deemed delivered on the date of this order.

IT IS FURTHER ORDERED that in actions having an opinion of this Court rendered on January 7, 1977, the mandate shall not be issued until the 21st day following the date of this order.

Entered: January 11, 1977. s/ Boyce F. Martin, Jr.
Chief Judge, Court of Appeals

SUPREME COURT OF KENTUCKY

SC-143-D

SILAS W. REDMOND MOVANT

V.

ROBERT WHEELER ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion of Silas W. Redmond for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED February 15, 1977.

Chief Justice

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS OF KENTUCKY
Civil Action No. CA-99-MR

SILAS W. REDMOND, APPELLANT

VS NOTICE OF APPEAL

ROBERT WHEELER, C. P. SULLIVAN, HOWARD DOWDY, JAMES ALEXANDER, JR., E. A. ROSS, AND E. W. ANDERSON, JR. BOARD OF TRUSTEES OF THE POLICEMEN'S AND FIREMEN'S PENSION FUND FOR THE CITY OF MAYFIELD, KENTUCKY, APPELLEES

1.

The appellant, Silas W. Redmond, states that he is taking the appeal and is appealing to the Supreme Court Of The United States Of America and that his counsel is Louis V. Mangrum whose address is Mangrum Building, Mayfield, Kentucky 42066.

2.

The appellant, Silas W. Redmond, further states that the appellees are Robert Wheeler, C. P. Sullivan, Howard Dowdy, James Alexander, Jr., E. A. Ross, and E. W. Anderson, Jr., Board Of Trustees Of The Policemen's And Firemen's Pension Fund For The City Of Mayfield, Kentucky, and that their counsel is Hon. Sam Boyd Neely, and his address is 238 North 7th Street, Mayfield, Kentucky 42066.

3.

The appellant, Silas W. Redmond, further states that he is appealing from the Judgment of the Court of Appeals Of Kentucky dated January 7, 1977, from which he by Motion For Discretionary Review went to the Supreme Court

Of Kentucky which by Order dated February 15, 1977, denied said motion and on February 24, 1977, issued its Mandate to that effect thereby rendering the Judgment of the Court Of Appeals Of Kentucky the Judgment of the highest Court of Kentucky and appealable to the Supreme Court Of The United States Of America which is hereby being done pursuant to Rule number 10 of the Supreme Court Of The United States Of America.

4.

The appellant, Silas W. Redmond, further states that he is hereby appealing to the Supreme Court Of The United States Of America pursuant to U. S. C. Title 28 Article 1257 (2) in accordance with U. S. C. Title 28 Article 2101 (c).

Louis V. Mangrum
Mangrum Building
Attorney for Appellant
Mayfield, Kentucky 42066
Tel. 502-247-6702

CERTIFICATE

I, Louis V. Mangrum, attorney for the appellant, Silas W. Redmond, hereby certify that I have served a copy of Notice Of Appeal on the appellees, Robert Wheeler, C. P. Sullivan, Howard Dowdy, James Alexander, Jr., E. A. Ross, and E. W. Anderson, Jr., Board Of Trustees Of The Policemen's And Firemen's Pension Fund For The City Of Mayfield, Kentucky, by mailing same to their attorney, Hon. Sam Boyd Neely, 238 North 7th Street, Mayfield, Kentucky 42066, with postage prepaid this the 28th day of February, 1977.

Louis V. Mangrum, Atty.

Filed March 1, 1977, as shown by page 249 of Record.

COMMONWEALTH OF KENTUCKY

Court of Appeals

MANDATE

Silas W. Redmond

File No. CA-99-MR
VS. Opinion Rendered January 7, 1977
Appeal From Graves
Circuit Court Action No. 5910

Robert Wheeler, Et Al

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

February 15, 1977 - Appellant's Motion For Discretionary Review Denied.

A Copy - Attest:

Issued.....February 24, 1977.....

MARTHA LAYNE COLLINS, ACTING CLERK